SHER TREMONTE LLP

September 23, 2016

VIA ECF

The Honorable P. Kevin Castel
United States District Judge
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *United States v. Gary Hirst*, 15 Cr. 643(PKC)

Dear Judge Castel:

We write on behalf of our client, Gary Hirst, to provide comments on the Court's most recent draft of the jury charge. Because we understand that the charge conference is anticipated to be short, we submit these additional comments in writing in order to ensure a complete record of our objections is made.

1) Regulation S

As the Court suggested, we have drafted and shared with the government a proposed instruction with respect to Reg S:

> As a general rule, under the U.S. securities laws, a company that has not filed a registration statement for specific shares of stock with the Securities and Exchange Commission may not sell those shares of stock publicly in the United States. The law also provides certain exemptions to this general rule. One such exemption is called Regulation S. Regulation S allows a company to sell unregistered shares of stock to persons who reside outside the United States. If the person who acquires those shares of stock resides outside the U.S., that person can sell those shares outside the United States. In order to be eligible for sale in the United States, those shares must be held for a period of time from 40 days to 1 year and then become the subject of a registration statement or another exemption from the registration requirement provided by the U.S. securities laws. The shares would immediately become eligible for sale in the United States if the company filed a registration statement. Shares issued or sold pursuant to Regulation S may be held in a U.S.-based brokerage account and may serve as collateral for a margin loan in a U.S.-based brokerage account.

80 Broad Street, Suite 1301 | New York, New York 10004
www.shertremonte.com | Tel: 212-202-2600 | Fax: 212-202-4156

2) Multiple Conspiracies

Given the evidence presented at trial, we respectfully renew our request for a charge on multiple conspiracies (first requested in our letter filed June 20, 2016). Here, the evidence at trial establishes that the jury could find Mr. Hirst guilty of a conspiracy different than the one charged by the government. It is undisputed that Gerova undertook significant efforts to register its shares, through the drafting and editing of several versions of an F-1 registration statement, in the months after the 5.3 million shares were transferred to Shahini and *before* the matched trading activity began. Thus, even assuming that the jury were to find that Mr. Hirst joined an unlawful conspiracy to put the shares into the hands of a foreign nominee, a rational jury could find that the object of that conspiracy was to register the shares and then sell them freely on the U.S. market. That others agreed to engage in market manipulation when the F-1 did not get filed (and the shares therefore remained unregistered) could just as easily have been a separate conspiracy entered into without Mr. Hirst's knowledge or assent. Accordingly, we respectfully request that the Court give the following charge on multiple conspiracies, which combines elements of our proposed charge dated June 17, 2016 and Judge Sand's instruction 19-5.

> In this case, the government has charged several separate and independent conspiracies with various groups of members. Proof of several separate conspiracies is not proof of a single, overall conspiracy. As I have instructed you, you must determine whether the conspiracy charged in the Indictment actually existed. If you find that the government has not proven beyond a reasonable doubt that the conspiracy charged in the Indictment existed, you must acquit Mr. Hirst of that conspiracy. This is so even if you find that some conspiracy not charged in the Indictment existed, even though the purposes of both conspiracies may have been the same and even though there may have been some overlap in membership.

3) Conscious Avoidance

We object to a conscious avoidance charge, because there is no evidence in the record that indicate that Mr. Hirst deliberately closed his eyes to a high probability of any fact and acted with willful blindness. Indeed, there is no allegation in this case that Mr. Hirst was willfully blind to any material fact or that he failed to investigate facts of which he was put on notice. The government's theory throughout has been that Mr. Hirst had actual knowledge of and participated in the conspiracy, going so far as to suggest that he deliberately backdated documents through the manipulation of computer metadata. While the government may argue inconsistent theories based on the evidence, here there is no evidence of an alternative theory that Mr. Hirst was willfully blind.

In its letter of September 22, 2016, the government first alleges that Mr. Hirst ignored a "high probability that the Sahhini shares were fraudulently issued" because he was unaware of the Shahini consulting agreement when he issued the shares, as evidenced by the fact that the consulting agreement was not included in the April 2010 letter to the AmEx exchange.[1] But none of the witnesses at trial testified that Jason Galanis was not entitled to a fee.[2] Furthermore, multiple documents admitted at trial make clear that the collective understanding of the Board of Directors was that Galanis had assigned his fee to Shahini. At the time Mr. Hirst issued the shares, he had already signed the Warrant Agreement establishing Shahini's right to the shares. Thus, there is no actual fact in the record to which Mr. Hirst turned a blind eye that would support a conscious avoidance charge. Second, the government suggests that a jury could conclude that Mr. Hirst willfully blinded himself to the "fraudulent nature" of Shahini's shares from the mere coincidence that Shahini received the same number of shares that were issued to and subsequently repurchased from Marshall Manley. That coincidence standing alone is insufficient to put Mr. Hirst on notice of the illegal objectives of the conspiracy charged in the Indictment. Accordingly, the Court should decline to give a conscious avoidance charge.

4) Reasonable Foreseeability of Acts and Declarations of Co-Conspirators

The Court's charge on liability for acts and declarations of co-conspirators (pp. 34-35) correctly notes at the outset that "the reasonably foreseeable acts or statements of any member of the conspiracy" may be imputed to the defendant. However, the Court's charge does not include this requirement in its further description of what the jury must find, which raises concerns that the jury will not appreciate this aspect of the charge. Accordingly, we respectfully request that on page 35, lines 2-3 of the first paragraph, the Court add, "may be considered against the defendant, ***so long as those acts or statements were reasonably foreseeable to the defendant.***" In the second paragraph, at lines 3-4, we respectfully request the Court add, "were made during the existence, and in furtherance, of the unlawful scheme, ***and were reasonably foreseeable to the defendant***," and at line

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[1] This contention is baffling, since the government alleged in the Superseding Indictment that part of Mr. Hirst's fraud was failing to disclose the Shahini consulting agreement in the April letter. Superseding Indictment ¶ 32.

[2] At best, witnesses testified that Joe Bianco "probably" made the introduction, Tr. 345:17-18, but Albert Hallac, the head of Weston, stated that "[t]here was no introduction needed. We knew *Jason* and Joe Bianco, and they approached me directly." Tr. 1166:11-12 (emphasis added).

6, add, "they were not in furtherance of the conspiracy, ***or were not reasonably foreseeable to the defendant***."

Similarly, we respectfully request that on p. 54, line 5, the Court add, "and all that is done thereafter, ***so long as those acts are reasonably foreseeable to the defendant***."

5) Additional changes

In addition, we respectfully request the following changes:

- Page 11: We respectfully request that the Court remove the sentence, "the testimony of an accomplice may be enough in itself for conviction, if the jury believes that the testimony establishes guilt beyond a reasonable doubt." Here, as a matter of law, the accomplice testimony is insufficient for conviction, and thus the instruction is misleading.

- Page 13: We respectfully request that the Court remove the instruction on "[e]vidence of a prior inconsistent statement is not to be considered you as affirmative evidence bearing on the defendant's guilt," because it is not clear how this instruction applies in this case.

- Page 18: We respectfully request that the Court omit the word "Government" in line 3.

- Page 26: We respectfully request that the Court omit, at the end of the page, "as conclusively as would direct proof, such as evidence of an express agreement."

- Page 60, following the questions: Replace "If he did" with "If the government has proved beyond a reasonable doubt that he did," and replace "If he did not" with "If the government has not proved beyond a reasonable doubt that he did."

Respectfully submitted,

/s/ *Michael Tremonte*

Michael Tremonte
Justine A. Harris
Noam Biale
SHER TREMONTE LLP
80 Broad Street, 13th Floor
New York, NY 10004
Tel: (212) 202-2600
Fax: (212) 202-4156
Email: mtremonte@shertremonte.com